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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GONZALO RUIZ,

Defendant and Appellant.

H037653

(Monterey County

Super. Ct. No. SS082107)

On November 6, 2008, pursuant to a negotiated disposition, Gonzalo Ruiz (appellant) pleaded no contest to possession of a concealed firearm (Pen. Code, § 12025, subd. (a)(1), count one),<sup>1</sup> possession of a controlled substance (cocaine) (Health & Saf. Code, § 11350, subd. (a), count two) and street terrorism (§ 186.22, subd. (a), count four).<sup>2</sup> In exchange for his no contest pleas, appellant was promised felony probation and the dismissal of two remaining counts.<sup>3</sup>

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<sup>1</sup> Subsequently, Penal Code section 12025 was repealed by the Legislature and enacted with virtually identical provisions as Penal Code section 25400. (Stats. 2010 ch. 711, § 4.) Since the charged crime was committed in 2008, we will refer to the 2008 version of Penal Code section 12025 as former section 12025.

<sup>2</sup> All unspecified section references are to the Penal Code.

<sup>3</sup> The two remaining counts were transportation of a controlled substance (Health & Saf. Code, 11352, subd. (a)), and driving on a suspended license (Veh. Code, § 14601.1).

On December 10, 2008, the court suspended imposition of sentence and placed appellant on probation on numerous conditions including that he obey all laws.

On September 17, 2009, the Monterey County Probation Department filed a petition in superior court alleging that appellant had violated his probation by failing to obey all laws. On September 22, 2011, appellant admitted he violated his probation. On October 25, 2011, the trial court sentenced appellant to two years eight months in prison consisting of the midterm of two years on count one (concealed firearms possession), one third the midterm on count four, to be served consecutively (street terrorism) and one third the midterm on count two (possession of cocaine), to be served concurrently to the sentence on count one.

Appellant filed a timely notice of appeal based on the sentence or other matters occurring after the plea.

On appeal, appellant contends that the prison term imposed on count one was unauthorized because he pleaded no contest to only a misdemeanor. The court erred by not staying the sentence on the street terrorism count because it was based on the same act, course of conduct and intent as the drug possession charge. Further, appellant challenges the imposition of a restitution fund fine that was imposed after he violated his probation. Finally, appellant argues that he is entitled to receive additional presentence conduct credits under the October 1, 2011 amendment to section 4019. For reasons that follow, we remand this case to the trial court for further proceedings.

*Facts of the Underlying Crimes<sup>4</sup>*

On August 8, 2008, officers were dispatched to Food4Less on a report of two Hispanic males entering the store; one of the males had been seen loading a firearm, which he placed in his waistband. A bronze Ford Mustang was associated with one of the men.

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<sup>4</sup> The facts are taken from the probation officer's report and testimony presented at appellant's preliminary hearing.

When officers arrived they noticed the Mustang leave the parking lot and enter a nearby gas station. Officers watched the driver of the Mustang, later identified as appellant, pump gas and then get into the car and drive to the front parking stalls of the gas station store. Appellant remained in the car and the occupant of another car walked over and spoke to appellant; this happened twice.

When the officers stopped appellant's car and later searched it they found a 38 caliber revolver concealed under the seat. The gun was not loaded and was not registered to appellant. No ammunition was found in the car. Drugs were found in the trunk of the car.

Appellant agreed to speak with the officers and admitted that he was a Sureño gang member. Appellant explained that he carried the gun for protection against both Norteños and other Sureños and was taking the drugs to a party to share with other gang members. Appellant said that the person from whom he had bought the drugs was his roommate from Oakdale; he was also a Sureño gang member.

A police gang expert testified at the preliminary hearing that appellant was an active participant in the Sureño street gang; he based this conclusion on appellant's statements to the police, his gang tattoos, his request to be placed in a Sureño gang pod in the jail and the statements made and gang indicia found in connection with the occupant of the other vehicle that had been at the gas station, who was detained by police on the same day appellant was detained. The expert opined that the firearm in the appellant's car was for the benefit of the Sureño gang as it could be used for protection and intimidation of other gang members and the public. Similarly, the drugs benefitted the gang because the drugs helped to recruit other gang members.

#### *Facts of the Probation Violation*

On September 2, 2009, officers from the Kern County Probation Department searched appellant's Bakersfield residence. During the search the officers found a

handgun and two magazines each containing seven rounds. In a search of a bedroom the officers located more ammunition rounds and paperwork belonging to appellant.

## *Discussion*

### *Alleged Sentencing Error*

Appellant contends that the plea and conviction for possession of a concealed weapon was for a misdemeanor offense. Therefore the prison term imposed for this offense was unauthorized and this court must strike the sentence and remand for resentencing.

Respondent counters that appellant's attack on his sentence is an attack on the validity of his plea for which appellant must obtain a certificate of probable cause. (§ 1237.5.) Furthermore, appellant agreed to a maximum four-year four-month prison sentence and thus is in essence challenging the validity of his plea.

"[S]ection 1237.5 provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.' [Citation.] 'Despite this broad language, [our Supreme Court has] held that two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under . . . section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.' [Citation.]" (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*).) "It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76 (*Panizzon*).)

The purpose of the certificate of probable cause requirement "is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.]" (*Panizzon, supra*, 13 Cal.4th at p. 75.) Thus, section 1237.5 " 'merely sets forth a procedure for precluding frivolous appeals by requiring the defendant to set forth grounds for appeal and, if he does so, by requiring the trial court to rule on the issue of probable cause.' [Citation.]" (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*).)

Our Supreme Court has clarified that "[e]ven when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement. [Citation.]" (*Johnson, supra*, 47 Cal.4th at p. 678.)

To determine whether section 1237.5 applies to an appeal arising from a guilty or no contest plea, we " 'must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citations.]" (*People v. Buttram* (2003) 30 Cal.4th 773, 781–782 (*Buttram*).)

Accordingly, for purposes of the certificate of probable cause requirement, the critical question is whether appellant's challenge to his sentence on count one is in substance a challenge to the validity of his plea.

Appellant argues that two separate allegations that would have made this offense into either a " 'wobbler' " or a straight felony were pleaded in this case; specifically, that the firearm and ammunition were in the immediate presence of and readily accessible to the appellant (former section 12025, subd. (b)(6)) and that appellant was an active participant in a criminal street gang during the commission of the offense (former section

12025, subd. (b)(3)). However, when he pleaded no contest he did not admit the additional allegations which would have made the crime into a felony.<sup>5</sup>

Thus, in effect, appellant seeks a ruling from this court that his plea of no contest to count one (concealed firearms possession) was to only a misdemeanor because he did not admit any special allegations that would make count one a felony.

Our review of the record of the shows that defense counsel outlined the plea agreement as follows: "Mr. Ruiz will be entering a plea to Count 1, the 12025; he will be entering a plea to Count 2, the 1350 [*sic*]; and he will be entering a plea to Count 4, the 186.22 (a) as a felony. That's for felony probation. [¶] I have advised Mr. Ruiz that the 186.22 is a strike." Immediately, the prosecutor stated, "we should clarify that 12025 should be a (b)(6)." Defense counsel thanked the prosecutor and the court responded, "[s]o is 12025(a)(1) pursuant to 12025 (b)(6)?" The prosecutor responded, "Yes."

Accordingly, it was explicit in the plea agreement that appellant would be pleading no contest to one count of carrying a concealed weapon and admitting a former section 12025, subdivision (b)(6) allegation.

Consequently, we find that admitting the truth of the allegation was an integral part of appellant's plea. " 'Since the challenge attacks an integral part of the plea, it is, in

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<sup>5</sup> In fact, the subdivision (b)(6) allegation was pleaded as part of the substantive crime and not as a separate special allegation. Specifically, it was alleged in count one "that the firearm and unexpended ammunition were in the immediate possession of, and readily accessible to[] the defendant and that the firearm was not registered to the defendant." A separate special allegation was pleaded. That is, that appellant "was not the registered owner of the firearm . . . within the meaning of Penal Code Section 12025 (B)(6)." This special allegation is nonsensical because a (b)(6) allegation requires two parts. A former section 12025, subdivision (b)(6) allegation provided that the offense is a "wobbler" if the defendant is not listed with the Department of Justice as the registered owner of the firearm *and* either the firearm is loaded or both the firearm and unexpended ammunition are in the immediate possession of, or readily accessible to, the defendant. (Former § 12025, subd. (b)(6).) Under these circumstances, it can be punished as either a felony or a misdemeanor. (*People v. Hall* (2010) 183 Cal.App.4th 380, 385.)

substance, a challenge to the validity of the plea, which requires compliance with . . . section 1237.5 . . . .' [Citation.]" (*Buttram, supra*, 30 Cal.4th at p. 782.)

Given that appellant's appeal on this issue challenges the validity of his plea, he was required to obtain a certificate of probable cause in compliance with section 1237.5. "When a defendant has failed to comply with the requirements of section 1237.5 and rule 31(d) [now rule 8.304(b)], the Court of Appeal 'generally may not proceed to the merits of the appeal but must order dismissal . . . .' [Citations.]" (*In re Chavez* (2003) 30 Cal.4th 643, 651.)

That being said, we must return this case to the trial court for resentencing for other reasons. At that time, appellant can clarify whether his plea to count one was to a felony or a misdemeanor.<sup>6</sup>

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<sup>6</sup> We note in passing that former section 12025, subdivision (b)(3), elevates the misdemeanor offense of concealed firearm possession (former § 12025(a)(1)) to a felony if committed by "an active participant in a criminal street gang, as defined in subdivision (a) of section 186.22." (Former § 12025, subdivision (b)(3).) In *People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*) the California Supreme Court used rules of statutory construction in analyzing the meaning of this phrase in the context of former section 12031, subdivision(a)(2)(C). (*Id.* at p. 1115.) Former sections 12025, subdivision(b)(3) and former section 12031, subdivision (a)(2)(C) were both enacted as part of the Anti–Street Crimes Act of 1995, and they both focus on carrying a gun. (Stats. 1996, ch. 787, §§ 1, 2, 3, pp. 4152–4154.) (*People v. Lamas* (2007) 42 Cal.4th 516, 522 (*Lamas*). In *Lamas*, the Supreme Court applied its *Robles* interpretation of former section 12031, subdivision (a)(2)(C) to the identical language found in former section 12025, subdivision (b)(3) and concluded that there must be evidence that a defendant promoted, furthered, or assisted *felonious conduct* by other gang members *distinct from* his otherwise misdemeanor offense of carrying a concealed firearm to elevate the offense to a felony pursuant to section 12025(b)(3). (*Id.* at p. 525.) In this case, appellant was charged with and admitted the street terrorism charge. The information charged appellant with street terrorism—count four—in relation to count three—the drug possession charge ["COUNT: 004, for a further and separate cause of complaint, being a different offense from but connected in its commission with the charge set forth in Count 003, complainant further complains and says: On or about AUGUST 8, 2008 the crime of STREET TERRORISM in violation of Section 186.22(a) of the Penal Code, a FELONY, was committed by GONZALO RUIZ, who at the time and place last aforesaid did willfully and unlawfully participate in a criminal street gang with the knowledge that the gang

### *Section 654*

As noted, after appellant's probation was revoked the court sentenced him to serve two years in state prison on the possession of a concealed firearm conviction, plus a consecutive eight-month term on the street terrorism conviction (one-third the midterm) and a concurrent eight-month term on the drug conviction (one-third the midterm).

Appellant contends that the court erred in imposing a concurrent sentence on the street terrorism conviction because the gang crime was based on the same act, course of conduct and intent as the drug possession charge.

Appellant argues that the street terrorism offense and the drug possession offense arose out of the same act and course of conduct "and had only one intent, to provide drugs for fellow gang members." Accordingly, the sentence on the street terrorism conviction should have been stayed pursuant to section 654.<sup>7</sup>

Respondent concedes the issue, but, relying on *People v. Cuevas* (2008) 44 Cal.4th 374 (*Cuevas*), argues that in order to raise this issue appellant was required to obtain a certificate of probable cause.

In *Cuevas*, the defendant entered into a negotiated plea agreement pursuant to which he would plead no contest to certain counts, others would be reduced or dismissed, and he would have a maximum possible sentence of 37 years eight months, which was the maximum possible sentence he could have received based on the charges to which he would plead no contest. After the pleas, the court sentenced the defendant to prison for 35 years eight months, and a second appeal presented the issue of whether the defendant's

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members did engage in a pattern of criminal gang activity, and did willfully promote, further or assist in felonious criminal conduct by members of that gang." Thus, appellant's admission to street terrorism could have elevated the misdemeanor concealed firearm possession to a felony under former section 12025, subdivision (b)(3).

<sup>7</sup> In pertinent part, subdivision (a) of section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

failure to obtain a certificate of probable cause barred a claim that his sentence on certain counts violated section 654. (*Cuevas, supra*, 44 Cal.4th at pp. 376-380, fn. 3.)

*Cuevas* did not involve a sentence lid, i.e., a sentence maximum or cap which is less than the maximum possible sentence the court lawfully could impose for the offense or offenses to which a defendant pleaded guilty or no contest. Instead, in *Cuevas*, the defendant agreed the court could sentence him to any term less than or equal to the agreed-upon maximum possible sentence for the offenses to which he pleaded no contest. (*Cuevas, supra*, at pp. 376-377.)

The *Cuevas* court stated, "[c]ontrary to defendant's contention, the presence or absence of a sentence lid does not dictate the result here. For purposes of the certificate of probable cause requirement, the critical question is whether defendant's section 654 challenge to his sentence is in substance a challenge to the validity of his plea. (*Shelton, supra*, 37 Cal.4th at pp. 766-767; [citations].) In other words, the question is whether defendant 'seeks only to raise [an] issue[ ] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal.' [Citations.] We conclude that defendant's plea agreement did not reserve such a postplea challenge because the maximum possible sentence defendant faced was 'part and parcel of the plea agreement he negotiated with the People.' [Citation.]" (*Cuevas, supra*, 44 Cal.4th at p. 381.)

Thus, the *Cuevas* court observed, " ' "When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement." ' ([Citation]; see *People v. Hester* (2000) 22 Cal.4th 290, 295 . . . ['defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process'].) 'Defendant's attack on the legality of his maximum sentence is an effort to unilaterally improve, and thus alter, the terms of that which was agreed and thus should not be

permitted without a certificate of probable cause.' [Citation.]" (*Cuevas, supra*, 44 Cal.4th at p. 383.)

At the time appellant negotiated his no contest pleas, the parties did not agree as part of the bargain that the trial court could or would impose a prison term up to four years four months. Indeed, at the time of the no contest plea, the parties did not agree on any sentence. The parties agreed appellant would be placed on formal probation. Probation is not a sentence. A court granting probation suspends the imposition or execution of sentence, and issues a conditional release as an act of clemency. (*People v. Daniels* (2003) 106 Cal.App.4th 736, 742.)

Certainly appellant was advised that the maximum possible sentence he could receive was four years four months for the offenses to which he was pleading, but this was an advisement not an agreement.<sup>8</sup>

In sum, nothing before or during the taking of the plea indicates appellant or the People were thinking about a prison sentence. There was no " 'mutual understanding' " (*Cuevas, supra*, 44 Cal.4th at p. 380) that the plea agreement to felony probation included a prison sentence that was " 'part and parcel' " (*id.* at p. 381) of the agreement appellant negotiated with the People.

Accordingly, we will address this issue without a certificate of probable cause.

Here, appellant was convicted of violating section 186.22, subdivision (a), which is part of the California Street Terrorism Enforcement and Prevention Act. (§ 186.20 et seq., added by Stats.1988, ch. 1242, § 1, pp. 4127–4129.)

Section 186.22, subdivision (a) applies to "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang."

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<sup>8</sup> In fact the record supports the conclusion that it was defense counsel that entered the four years four months on the waiver of rights form that appellant signed.

As can be seen, the statute indicates that the gang crime has three elements: (1) active participation in a criminal street gang, (2) knowledge that the members of the gang engage in or have engaged in a pattern of criminal gang activity, and (3) the person "willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." (§ 186.22; *People v. Lamas*, *supra*, 42 Cal.4th 516, 523.)

In *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), our Supreme Court held that a sentence for a violation of section 186.22, subdivision (a)—street terrorism or what the Supreme Court labeled the "gang crime" (*id.* at p. 197)—must be stayed pursuant to section 654 when the acts establishing the defendant willfully promoted, furthered, or assisted in any felonious criminal conduct by gang members is the same criminal conduct the defendant was convicted of and punished for in the trial. (*Id.* at pp. 197-201)

In this case, one part of the sentence the trial court imposed on appellant was a consecutive eight-month term for violating section 186.22, subdivision (a), count four. Since the only evidence presented at the preliminary hearing to support the felonious criminal conduct element of section 186.2, subdivision (a) was the other crimes of which appellant was convicted and punished, the sentence on count four must be stayed.

However, we must remand this case to the trial court for resentencing. In sentencing appellant on the three counts, the court decided to run the sentence on count three (possession of cocaine) concurrent to the sentence on count one (concealed firearm possession). At the time, the court did not have the benefit of the *Mesa* decision. Accordingly, the court did not consider the applicability of section 654 in determining whether to impose a concurrent or consecutive sentence on count three. (Cal. Rules of Court, rule 4.424 [before determining whether to impose either concurrent or consecutive sentences on all counts the court must determine whether section 654 requires a stay of execution of the sentence imposed on some counts].)

Finally, we note that we are not persuaded by respondent's contention that the trial court made an implied finding that appellant's concealed firearm possession was a

separate act from his gang participation (with a separate intent). Since, as a general rule, it is the sentencing court that determines the defendant's intent and objective under section 654 in the first instance (see, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162) a remand is required for the trial court to make this determination in light of *Mesa, supra*, 54 Cal.4th 191. An examination of the facts is essential to determining whether multiple convictions are based upon a single act or omission or a divisible course of conduct. (*Id.* at p. 196.)

For the guidance of the trial court on remand we will address appellant's remaining issues.

#### *Restitution Fine*

When the court admitted appellant to probation on December 10, 2008, the court ordered that appellant pay a restitution fund fine pursuant to section 1202.4, subdivision (b).<sup>9</sup> Specifically, the court ordered that appellant pay a "restitution fine as outlined in Item 5" of the probation officer's report. Item 5 of the probation officer's report recommends a restitution fund fine of "\$400" for "Counts 1 and 4." Nevertheless, the minute order from the hearing indicates that appellant was ordered to pay \$600.

Subsequently, when appellant was sentenced to prison, the court imposed a restitution fund fine pursuant to section 1202.4, subdivision (b)(1) in the amount of \$1200 pursuant to the formula therein.

Appellant contends and respondent agrees that the court erred in imposing a second restitution fund fine.

Although appellant did not object below to the imposition of the second restitution fine, appellant did not forfeit the claim of error. (See *People v. Chambers* (1998) 65

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<sup>9</sup> Effective January 1, 2012, the minimum amount of the restitution fund fine increased to \$240. (Stats. 2011, ch. 358, § 1.) Throughout this discussion we refer to the version of section 1202.4 that was in effect when appellant was sentenced as former section 1202.4.

Cal.App.4th 819, 823 (*Chambers*) [failure to object at sentencing did not forfeit challenge on appeal because trial court exceeded its statutory authority in imposing the second restitution fine]; see also *People v. Andrade* (2002) 100 Cal.App.4th 351, 354 [failure to object to imposition of allegedly unauthorized parole revocation restitution fine did not forfeit challenge on appeal].)

Trial courts are required to order restitution fines in every case where a person is convicted of a crime, unless it finds compelling and extraordinary reasons for not so doing, which must be stated on the record. (Former § 1202.4, subd. (b).) The amount of the fine shall be set at the court's discretion. If the defendant is convicted of a felony, the fine may not be less than \$200 and may not exceed \$10,000. (Former § 1202.4, subd. (b)(1).)

Nevertheless, the imposition of a restitution fine at the time of conviction and granting of probation survives subsequent probation revocation. (*Chambers, supra*, 65 Cal.App.4th at pp. 822–823; *People v. Downey* (2000) 82 Cal.App.4th 899, 921.) In *Chambers*, the trial court imposed a restitution fine on the defendant as a probation condition at the time of his conviction for first degree burglary. (*Chambers, supra*, 65 Cal.App.4th at p. 821.) Subsequently, the court revoked the defendant's probation, sentenced him to nine years in state prison and imposed another restitution fine. (*Ibid.*) The *Chambers* court reasoned that "[r]estitution fines are required in all cases in which a conviction is obtained. Furthermore, there is no provision for imposing a restitution fine after revocation of probation. The triggering event for imposition of the restitution fine is still conviction. [Citation.]" (*Id.* at p. 822.) In striking the second restitution fine, the *Chambers* court found that the trial court had imposed two separate restitution fines for the same conviction and stated that "[t]here is no statutory authority justifying the second restitution fine because . . . the first restitution fine remained in force despite the revocation of probation." (*Id.* at p. 823.) Accordingly, since the trial court was without

statutory authority to impose the second restitution fine, the *Chambers* court modified the judgment to strike the second fine. (*Ibid.*)

Here, the trial court imposed a restitution fine at the time of appellant's conviction and original grant of probation. Later, after revoking appellant's probation and sentencing appellant to prison the trial court imposed an increased restitution fine of \$1200. As in *Chambers*, here the trial court lacked statutory authority to impose an additional or greater restitution fine because the restitution fine imposed at the time of appellant's conviction remained in force despite the later revocation of appellant's probation. (*Chambers, supra*, 65 Cal.App.4th at p. 823.)

Nevertheless, as can be seen, there is some confusion as to amount of the fine originally imposed. Appellant, relying on the rule that the court's oral pronouncement of judgment controls over the sentencing minutes, urges that the amount of the fine was \$400. Respondent does not disagree with this general rule, but points out that the minutes of the sentencing hearing, which indicate a \$600 fine, were signed by the trial court on December 11, and the court did not actually orally impose a \$400 restitution fund fine. Rather, the court referenced the probation report.

We are not persuaded by respondent's argument for the simple reason that the signature on the sentencing minutes is no more than an indecipherable line.

Generally, when there is a discrepancy between the oral pronouncement of judgment and the minute order, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–186; *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Since the court did make reference to the probation report when it imposed the fine at the time appellant was admitted to probation and that report reflects a restitution fine of only \$400, appellant's restitution fine is \$400. The corresponding parole revocation fine that was imposed but suspended at the time appellant was sentenced to state prison must also be reduced to \$400. (§ 1202.45 [parole revocation fine assessed in the same amount as that imposed pursuant to subdivision (b) of section 1202.4].)

### *Section 4019 Credits*

Appellant argues that an amendment to section 4019 effective October 1, 2011, must be applied to his case by virtue of the equal protection clauses of the California and federal Constitutions.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in presentence custody (sometimes referred to as one-third time or credits calculated at 33 percent). (Stats.1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [section 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony such as appellant. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after

that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to section 4019 in 2011 as relevant to appellant's equal protection challenge. These statutory changes, among other things, reinstituted one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only. (§ 4019, subds. (b), (c), & (h).)

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011 (hereafter the October 2011 amendment) are to have prospective application only—i.e. to crimes committed on or after the effective date of the statute, appellant contends that the October 2011 amendment to section 4019 violates the equal protection clauses of the federal and California Constitutions if it is not applied retroactively.

In his reply brief appellant concedes this court is bound by the California Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).

In *Brown*, the Supreme Court confirmed that the October 2011 amendments to section 4019 have prospective application only. The court noted that the defendant had filed a supplemental brief in which he contended that he was entitled to retroactive presentence conduct credits under the 2011 amendment to section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply *prospectively* . . . to prisoners who are confined to a county jail [or other facility] *for a crime committed [on] or after October 1, 2011.*' (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, appellant committed his offenses in 2008.

Accordingly, we must reject appellant's argument that we must apply the October 2011 amendment to section 4019 to his presentence custody in this case.

*Disposition*

The judgment is reversed and the matter is remanded to the trial court for the limited purpose of resentencing appellant.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.